In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 286

L. BUFORD HALL, L. FELTON HALL, and ERNEST W. HALL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-18; II R. 488-489)[1] is reported at 330 F.2d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1964 (II R. 490). A petition for rehearing (II R. 491-495) was denied on May 22, 1964 (II R. 496). On June 18, 1964, Mr. Justice Black extended

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[1] "R." designates the two-volume record on file with the Clerk of this Court.

the time for filing a petition for a writ of certiorari to and including July 15, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports petitioners' convictions under either of two counts of the indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on each count of a four-count indictment charging them with forcibly assaulting an Internal Revenue agent with a dangerous weapon in violation of 18 U.S.C. 111 (count one), and with violating the provisions of the Internal Revenue Code relating to distilled spirits (counts two-four) (I R. 2-4, 23-24; II R. 481-482).[2]

1. The evidence at trial showed that on the evening of September 2, 1962, an Internal Revenue agent discovered a temporarily inactive illegal distillery in a heavily wooded area in Clayton County, Georgia. While at the site, the agent placed some "flourescent paste" on the handle of a shovel and on other equipment which he found there (II R. 295-296). Thereafter, on the night of September 24, other agents checked the site and found fermenting mash fit for distillation and the still set up and ready to operate (I R. 189-190, 203).

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[2] Count two charged possession, custody and control of an unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); count three charged the fermentation of mash on unauthorized premises (26 U.S.C. 5601(a)(7)); and count four charged knowing possession of distilled spirits in containers not having the requird stamps affixed thereto (26 U.S.C. 5604(a)(1)) (I R. 3-4).

The following evening, federal agents returned to the vicinity of the still and heard sounds which indicated that the still was in operation. They also saw a large truck parked in the area and on several occasions witnessed men carrying flashlights walking to and from the truck from the direction of the distillery (I R. 136-138, 191-192; II R. 233-236). At about 10:30 p.m., some men were seen to come from the direction of the still, enter the truck and start to drive it away with the lights off (I R. 141, 192-193). At this point, Internal Revenue Agent Howell stepped from behind a tree into the path of the slowly-moving truck, turned his flashlight on, and, in a loud voice, shouted that he was a federal officer. He ordered the occupants (who turned out to be the petitioners) to stop the truck (I R. 143, 156-157; II R. 235-236). Instead of heeding this command,[3] the truck's headlights were put on and it was accelerated in Howell's direction. The agent jumped aside and leaped onto the running board on the passenger side of the truck and again told the occupants that he was a federal officer and that they should stop (I R. 143, 158, 217 ; II R. 250, 394-395). The two passengers (L. Buford Hall and Ernest W. Hall (I R. 209; II R. 431))[4] attempted to pull Howell into the cab of the truck, and struck him numerous times about the face and head with some "metal object" (I R. 143-144; II R. 402-403). While the struggle continued with the truck still moving, agent Howell pulled his revolver and again ordered petitioners to stop (I R. 144). The occupants then attempted to seize the agent's

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[3] Petitioner Ernest W. Hall testified for the defense that no such identification was made, nor such command given (II R. 432-433).

[4] Petitioner L. Felton Hall was driving the truck (I R. 209; II R. 431).

gun and, in the scuffle, a shot was fired. The agent fired several more shots into the cab and was then knocked off the truck by the occupants, or pulled off by an adjacent barbed wire fence. After he fell, the truck was apparently driven over his right forearm and hip. As a result of his injuries the agent was hospitalized (I R. 144-146, 170-172, 196; II R. 237). The truck was then driven away.

Some time later, the truck was discovered parked in the rear of the residence of a relative of petitioners (II R. 262). Inside the truck the agents found a shovel, a flashlight and some clothing (II R. 263, 304). Examination of the shovel and clothing revealed that they bore fluorescent material identical to that placed by the federal officer on the shovel and other items found at the still on September 2, 1962 (see *supra*, p. 2; II R. 295-296, 305, 325). Additionally, fragments of a "dough like" substance, similar to the kind found at the distillery, were discovered on the flashlight and on articles of clothing worn by petitioners (I R. 199, 209-211; II R. 264, 376-382, 388-389). Moreover, "unusual boot-prints" found by the officers at the still-site on September 24, and 26, 1962, were similar to prints made by the boots of petitioner L. Buford Hall (I R. 189-190; II R. 330, 366, 369).

The distillery itself was in operation on the night of the assault on agent Howell and was found to consist of two stills, a quantity of mash fit for distillation, and over 250 gallons of whiskey. There was no sign posted to indicate that the distillery was registered, nor did the barrels containing the whiskey have the requisite tax stamps affixed (I R. 199-200; II R. 297-298, 308, 311, 329-330).

Petitioners' defense, primarily presented in the testimony of petitioner Ernest W. Hall, was that on the evening of the assault the petitioners were fishing in an adjacent pond and had nothing to do with any still; that while they were driving in the truck away from the pond they heard a pistol shot; that four other shots fired at them followed in rapid succession; and that they heard no one announce he was a federal officer or tell them to stop before the shots were fired, nor did they know that the person who fired the shots was a federal agent (II R. 426-443; 420-423).

2. In his instructions to the jury relating to the charge contained in count one (assaulting a federal officer with a deadly weapon) the court stated, *inter alia* (II R. 466, 477):[5]

> Now there are three essential elements that are required to be proved in order to establish the offense charged in the first count in the indictment:
>
> First: The act or acts of forcibly assaulting an investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service while such officer was engaged in the performance of his official duties, as charged:
>
> Second: The act or acts of using a deadly or dangerous weapon, as charged, in the commission of the alleged forcible assault; and
>
> Third: Doing such act or acts willfully.

Defense counsel excepted to the charge requesting, *inter alia*, that the jury be informed that before they "would be authorized to convict on Count one, they

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[5] The court gave the instructions on count one twice—the second time at the request of the jury (II R. 474).

must first find that the defendants knew that the person assaulted was a federal officer; and also that defendants knew such officer was in the discharge of his official duties" (II R. 479). The court refused to so charge.

ARGUMENT

As the court of appeals held, there is no need to examine into the validity of petitioners' convictions on counts two and three of the indictment—charging possession, custody and control of an unregistered still (count two) and fermentation of mash in unauthorized premises (count three)*—since the general sentences imposed on each of the petitioners is fully supportable on either count one of four. *Claassen* v. *United States*, 142 U.S. 140, 146-147; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, n. 1; *Emspak* v. *United States*, 349 U.S. 190, 195, n. 9.

As for count one—forcibly assaulting an Internal Revenue agent with a dangerous weapon—the jury could find from the evidence that petitioners had severely beaten agent Howell with a "metal object" and driven over him with a truck, even after he had made known to them his identity as a federal officer and

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* With respect to these two counts the jury was charged, in accord with the statutory presumptions contained in 26 U.S.C. 5601(b)(1) and (3), that unexplained presence of petitioners at the still site authorized, but did not require their conviction (II R. 469-470).

The question as to the constitutionality of the presumptions embodied in 26 U.S.C. 5601(b)(1) and (2) is presently pending before this Court on a writ of certiorari to the Court of Appeals for the Fifth Circuit in *United States* v. *Barrett*, No. 13, O.T., 1964. The government had also filed a petition for writ of certiorari from the Second Circuit decision in *United States* v. *Romano*, No. 172, O.T., 1964, involving the constitutionality of the presumption contained in 26 U.S.C. 5601(b)(4) as well as subsection (b)(1). The court below had held the presumptions contained in (b)(1) and (2) unconstitutional in *Barrett*.

ordered them to stop the vehicle. (See Statement, *supra*. pp. 3-4.) Petitioners argue (Pet. 10-12) that the trial court gave an inadequate instruction on knowledge, in that it failed to charge that in order to convict on count one, the jury had to find that, at the time of the assault, petitioners knew that Howell was a federal officer in the discharge of his duties. While earlier cases in the Fifth Circuit support the view that the jury must so find, (*e.g., Hall* v. *United States,* 235 F. 2d 248; *Carter* v. *United States,* 231 F. 2d 232, certiorari denied, 351 U.S. 984; *Hargett* v. *United States,* 183 F. 2d 859[7], a more recent decision in the Fifth Circuit has, at least by implication, rejected this view and ruled that 18 U.S.C. 111 does not require "that the doer of the act have knowledge that the person who is assaulted, resisted, opposed, impeded, intimidated, or interfered with is a federal officer". *Bennett* v. *United States,* 285 F. 2d 567, 569-570, certiorari denied, 366 U.S. 911; see also, *McNabb* v. *United States,* 123 F. 2d 848, 854-855, (C.A. 6), reversed on other grounds, 318 U.S. 332 (relating to the killing of an officer); *United States* v. *Bruce,* 33 F.R.D. 133, 135 (N.D. Miss.); *United States* v. *Combs,* 73 F. Supp. 813, 814 (E.D. Ky.); cf. *Hanis* v. *United States,* 246 F. 2d 781, 785 (C.A. 8). Obviously the later rulings are sound; if it is established that the defendant committed an assault—itself, a criminal act—the statute requires only proof that the victim was in fact an officer engaged in the performance of his duties.

This Court's decision in *Pettibone* v. *United States,* 148 U.S. 197, on which petitioners rely (Pet. 10), is

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[7] There are also district court decisions to that effect. *United States* v. *Miller,* 17 F.R.D. 486 (D. Vt.); *United States* v. *Bell,* 219 F. Supp. 261 (E.D. N.Y.); see also *Sparks* v. *United States,* 90 F. 2d 61 (C.A. 6).

not to the contrary. *Pettibone* involved the entirely different situation of a charge of conspiracy to obstruct administration of justice. Obviously, where, as in *Pettibone,* the essence of the crime is an agreement, there must be knowledge of the unlawful purpose.

In any event, petitioners' convictions are wholly sustainable on count four charging possession of distilled spirits in containers not having the requisite tax stamps affixed. The evidence showed that over 250 gallons of whisky in unmarked barrels were found at the still. That this alcohol was in petitioners' possession within the meaning of the statute was shown by the following facts: fluorescent material placed on equipment at the still was found on a shovel and clothing found in the truck driven by petitioners; a "dough like" substance used at the still was found on a flashlight in the truck and on clothing worn by petitioners (see Statement *supra,* p. 4); and it appears that petitioners were the only persons present there. In short, there was ample evidence from which the jury could find that petitioners were the operators of the illegal distillery and possessors of the untaxed alcohol found at the still-site.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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